In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 28

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SUPERIOR PORTLAND CEMENT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR SUPERIOR PORTLAND CEMENT, INC.

This separate brief will be confined to the facts directly concerning Superior Portland Cement, Inc., herein called "Superior." With respect to the failure of the Federal Trade Commission to establish any case against the industry generally, we refer to and adopt the briefs of the other Respondents in these related cases.

Superior has found it necessary throughout the ten years' history of this case to preserve its independent appearance because of the differences between marketing practices in its trade area and those in every other section of the United States. The differences stem from conditions peculiar to the restricted area in the State of Washington

west of the Cascade Mountains, which is Superior's market. Superior's actual pricing practices are inconsistent with participation in the conspiracy here charged.

As Justice Holmes remarked in *Northern Securities Co. v. U. S.*, 193 U. S. 197, "great cases, like hard cases, make bad law." This observation is particularly applicable in litigation of the instant magnitude, because of the difficulty of examining the separate facts concerning each respondent. If justice is to be done, the task must be undertaken, however. The Court will find the task worthwhile, because in the separate evolution of the marketing practices of each company lies great illumination on the over-all issues of the case. This is true of Superior, as we will point out in the conclusion of this brief. Superior's twenty years of actual experience with f.o.b. mill selling demonstrates that this method which the Commission here seeks to compel cannot be maintained in an active, competitive market.

STATEMENT OF THE FACTS CONCERNING SUPERIOR

Superior Portland Cement, Inc., of Seattle, Washington, manufactures cement at Concrete, Washington, about one hundred miles from Seattle. Since 1931, Superior also has leased and operated the Seattle plant of the Pacific Coast Cement Company. (Fdgs. Par. I (3o), R. 15976;

R. 3168). Superior does not sell cement into other states. (R. 1582-83, 3168, 3180-81, 3195-96, 3201-02, 3206; Fdgs. Par. II, R. 15979).

From its start in 1908 until 1928, Superior sold cement almost entirely at f.o.b. mill prices as did its competitor, Olympic Portland Cement Co., at Bellingham, Washington. (R. 3170-72). In 1928, Northwest Portland Cement Company began operations at Grotto, Washington, and about January 1, 1929, Pacific Coast Cement Company began operations at its mill in Seattle. (R. 3169-71, 3193). Northwestern soon commenced quoting destination prices to Superior's customers less than the cost of Superior's cement purchased f.o.b. mill at Concrete, Washington, plus freight. In 1929, when Pacific Coast entered the field, they did likewise. Pacific Coast had a 30c per barrel freight advantage in the Seattle market. (R. 3172-3, 3193).

These destination price cuts were at first sub rosa. (R. 3173). Superior, as it learned of them, met them by quoting destination prices of its own, that being the only practical way of meeting this competition. (R. 3172, 3193). Soon the price cutting and accompanying destination prices became widespread, and in 1929 Superior went to a general destination price basis which has continued since. (R. 3172-74, 3193). This price war continued from 1929 until June, 1931. (R. 3176-78, 3194). The price which had netted Superior $2.10 at Concrete

dropped to 90c net at Concrete. (R. 3240). In June, 1931, Superior raised its price to $1.90 net at Concrete and the other companies followed. (R. 3177-78, 3194-95).

Since 1929, Superior's destination prices, where there is no competition with out-of-state cement, have consisted of its desired net at its mill plus freight to destination. Where, however, it finds a lower price being quoted by some other mill at the destination, it reduces its price to meet that lower price. (R. 3182-83, 3201). Where Superior competes with cement coming into Washington from other states, its prices have no reference to mill nets plus rail freight of its own or any other mill. (R. 3185-87, 3198-3200, 3206-3208, 13213-4). For more than 25 years this competition has existed in a broad strip of the southern part of the State of Washington, along the north side of the Columbia River. (R. 3185-86, 3198-3200, 3208, 3224-25, 3250-51, 13213-4). Cement coming into this area moves by rail, water and truck from Washington, Oregon and California. (R. 3186, 3190, 3198-3200, 3208-09, 3224-26, 3256, 13213-4). Truckers carrying produce into Portland, Oregon, buy cement f.o.b. mill from Oregon Portland Cement Co., and make their return trip profitable by selling cement at their home town, which may be as far away as Yakima, Washington. (R. 3208-09, 3224-26). As far as cement prices go, this area

is distress territory, and there is continual strife. Prices vary constantly and are so low that Hollister of Northwestern Portland Cement Co. testified that he would be insane to sell in that area, and he does not. (R. 3185-87, 3250-51, 13235).

On government invitations, Superior has uniformly quoted non-identical prices and has bid f.o.b. mill when desired by the government. Superior's government bids have never been based on mill net plus rail freight either of its own mill or any other mill. The only exceptions to its consistent record of non-identical bidding were on three invitations where Superior bid on the basis of filed prices under the NRA Code. And even on these bids, the filed prices which Superior followed did not reflect the mill net plus rail freight of any mill. Fifteen government bids by Superior are shown by admitted evidence. In ten of these, Superior made non-identical f.o.b. mill bids that resulted in non-identical cost to the government at its destination. Two were destination bids, as requested by the government, and were non-identical. The remaining three were the NRA bids above mentioned. Evidence of a large number of additional non-identical bids was offered by Superior and excluded for evidentiary reasons. (R. 462-64, 466-67, 468, 470-71 3650, 3659-62, 3710-12, 3730, 3733-35, 5422-23, 6426, 6475-77, 15162 p-q, 15162 dd; Com. Exs. 111F, 112A-D,

1339, 1340, 1404, 1418, 1422, 1424, 1426; Resp. Exs. 264A-H, 340A-H, 344A-L, 345A-J, 350A-K, 369A-Z, 370A-K, 371A-K, 372A-W, 373A-M. c.f. Motion for Leave to Adduce Additional Evidence (R. 16642-16645) denied by Court below, which is hereby renewed, and offers of proof on which said motion is based (R. 6479-82, 6529-37, 6539-44, 14984-95, 15162 s-u; Resp. Exs. 374A, 3659z-20, z-57, z-59, z-69, 3660 a, v).

On June 15, 1933, Superior joined the Cement Institute in response to a circular letter urging it to join because the Institute was "the only available vehicle through which the cement industry could promptly and efficiently meet the requirements of any governmental authority created to carry into effect the proposed Federal (NRA) legislation." (R. 3168, 3196, 9075-76, 9077-79, 13230, Resp. Exs. 1366, 1805, 2173A-C, 2930A-B).

E. P. Lucas, President of Superior, was for a time a trustee of the Institute. (Com. Ex. 593D-E). However, Superior's use of the Institute has been extremely limited. (R. 5309, 13230). The Institute assisted the Company in obtaining refunds of compensating processing taxes. (R. 13230). Superior cooperated with the Institute in efforts to obtain tariff legislation. (R. 13230). The other services of the Institute were not used by Superior. It did not receive the freight rate service. (R. 3196, 13230). It did not follow the Code of Ethics, which

in fact was cancelled when the Company joined the Institute, and the Company's practices differ from the Code of Ethics in a great variety of ways. (R. 13240-41; Com. Ex. 605A-C, Resp. Ex. 2174A-C). It did not follow the Compendium of Marketing Practices. In fact, in at least eleven respects Superior's practices differ from the Compendium. (R. 13239-40). It did not use the contract checking or credit reporting services of the Institute. (R. 13230). The only statistical service received by Superior were reports based on Bureau of Mines figures. (R. 3185, 5496).

SUMMARY OF ARGUMENT

Superior does not sell cement into states outside the State of Washington. Where competing with cement coming into Washington from other states, its prices do not reflect the mill net of any mill plus rail freight. This competition involves continuing strife, constantly fluctuating abnormally low prices, consistent non-identical bidding, and f.o.b. mill bidding whenever requested. These facts forbid any conclusion that Superior agreed to employ and actually employed the "multiple basing-point system" on sales between states, which is the conspiracy here charged.

Superior sold f.o.b. mill for twenty years, but was forced to go to destination pricing to compete successfully in a bitter price war which came with

the advent of two new local mills. No companies from outside the state were involved. Local competition, not national conspiracy, is responsible for Superior's pricing practices.

The Commission's argument that membership in the Institute and use of the "pricing system" is sufficient to hold any company as a member of the asserted conspiracy fails as to Superior because there are no findings and no evidence that Superior used the "system" in connection with sales between states, as here charged. Membership in the Institute alone is insufficient, since one cannot infer from membership that Superior did that which the direct evidence affirmatively establishes it did not do, viz: use the "multiple basing-point system" in connection with sales of cement between states.

Superior could not have discriminated in price in violation of the Clayton Act, since it does not sell between states, and its pricing practices where coming into contact with cement moving between states do not involve the asserted discriminations.

ARGUMENT

I.

Superior's Pricing Practices Negative Participation in Any Conspiracy As Alleged in Count I

Not only is there a complete absence of evidence and findings sufficient to sustain any order against

Superior in this case, but also the record affirmatively establishes that Superior's pricing practices are inconsistent with any agreement to employ and actual employment of a "multiple basing-point system of pricing" on sales of cement between states, which is the conspiracy here charged. (R. 29, 48, 54).

Superior sold f.o.b. mill for twenty years, but could not maintain this method of selling in the price war which came with the advent of two local mills, first, respondent Northwestern Portland Cement Company, and later Pacific Coast Cement Company. These mills attempted to get business of individual customers by quoting special prices on a basis the customer could readily understand—a destination price which was less than the cost at the customer's place of business of Superior's cement. If it had maintained its uniform f.o.b. mill pricing system, Superior would have had to adjust its price to its entire market for every cut in price made by competitors to some individual customer at some particular point. In a price war such as that occurring in western Washington, this would have meant almost daily fluctuations in price to its entire market, which would have been demoralizing to dealers and particularly to contractors bidding on jobs. The only practical answer was to quote destination prices whereby price cuts at a particular delivery point

could be met without simultaneously readjusting price for the entire market. Superior in 1929 was for these reasons forced to go to destination pricing and has sold in the same way ever since. No conspiracy was involved in this change, nor was it influenced by any cement companies from outside the state.

No phantom freight is present in Superior's destination prices. On sales involving no out-of-state competition, Superior charges the mill net it desires, plus actual freight, but where it finds a lower price quoted by some other company at some destination, it reduces its price to meet it. Where out-of-state cement comes into Washington to compete with Superior, however, the prices do not reflect any mill net plus rail freight, and there is continuing strife and distress prices which constantly vary. (Statement, pp. 4-5, supra).

Superior does not sell cement into states other than Washington. Superior, then, could not be charged with conspiring to restrain competition on its own sales between states. If any place, only in competing with sales between states by other companies could Superior agree to employ and actually employ the alleged "system" to restrain competition, as here charged. But the uncontradicted evidence establishes that the alleged pricing "system" of mill nets plus rail freight is not used

where Superior competes with cement coming in from other states.

The same is true of Superior's bidding on government invitations, where it sometimes meets out-of-state competition. Of all the bids by Superior shown in the record, not one reflects the alleged "system" of mill net of the nearest mill plus rail freight. Moreover, all the bids made by Superior were non-identical with other bids, both in price at the mill and net cost to the government at destination, except for three bids based on filed prices under the NRA Code. It is apparent why Admiral Peoples, Director of Procurement of the Treasury Department, testified that "west of Denver we have been able to obtain competition on the basis of f.o.b. mill prices." (R. 3710).

Continuing strife, constantly fluctuating abnormally low prices, consistent non-identical bidding, f.o.b. mill bidding whenever requested, prices which reflect no mill net plus rail freight—these fundamental aspects of Superior's pricing practices wherever it has contact with out-of-state cement are completely inconsistent with the Commission's theory of nationwide conspiracy.

The Commission asserts that two "general principles" are sufficient to charge each company with participation in the alleged conspiracy, namely, membership in the Cement Institute, plus adherence to the alleged pricing "system." (Br., pp. 93,

96). As a basis for this argument as applied to Superior, the Commission refers first to Finding 7 (n).[1] Preliminarily, may we point out that Finding 7(n) is in no way a direct finding that Superior has employed the alleged "system." Only by inference, if at all, does it so indicate, and not even by inference does it indicate that Superior conspired or agreed with anyone, or that it has used the alleged "system" in connection with sales of cement between states, which, in light of the previous finding (R. 15979) that Superior does not sell between states, is not something to be assumed. There is not, either in this Finding or any other concerning Superior,[2] the certainty required in finding participation in a conspiracy as a basis for administrative action. Essential facts must be expressly found and not left to inference or im-

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[1]Paragraph 7 (n): "The multiple basing-point delivered price system was extended to western Washington in 1931. Its introduction there followed a price war which commenced when two new mills began operating in that territory, one in 1928 and the other in 1929, and was approximately coincident with the leasing of one of these new mills by Superior Portland." (R. 16000).

[2]No other finding concerning Superior mentions the multiple basing-point system. The only other findings concerning this company are:

Paragraph One (So): "Respondent Superior Portland Cement, Inc., (hereinafter frequently referred to as 'Superior Portland') is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, Washington. It is a producer of cement and its manufacturing plant is located at Concrete, Wash-

plication.[3] Particularly is this true where, as here, there is affirmative proof of facts indicating that Superior could not have been a party to such a conspiracy.

Nevertheless, the defects in the Commission's case are even more basic. The Commission's brief (p. 103) states that Finding 7 (n) has ample evidentiary support, and cites certain testimony and exhibits. We challenge this statement. None of the evidence cited indicates that any "system" was extended to western Washington in 1931[4] or at any other time, and what is more particularly in point, not one iota in it indicates that Superior agreed to use or actually used the alleged "system" in connection with sales of cement between states. In fact, this evidence develops the marketing prac-

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ington. Since 1931 it also has leased and operated the Seattle plant of the Pacific Coast Cement Company. It became a member of the Institute in June, 1933." (R. 15976).

Paragraph Two: "* * * Superior Portland, with a few exceptions, makes sales and shipments outside the State of Washington only to Alaska * * *." (R. 15979).

Paragraph Four (b): "* * * Superior Portland leases and operates the Seattle plant of the Pacific Coast Cement Company. * *" (R. 15982).

[3] *Wichita Railroad & L. Co. v. Public Utilities Commission*, 260 U. S. 48, 59; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511. See also *Mahler v. Eby*, 264 U. S. 32, 44; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 432-433; *Securities & Exchange Com. v. Chenery Corp.*, 318 U. S. 80, 94-95.

[4] As a matter of fact, Superior has not changed pricing methods since 1929, when it went to destination prices. (See Statement, p. 3, supra).

tices in western Washington to be as heretofore in this brief described.[5]

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[5]The evidence cited by the Commission in support of this finding is as follows:

R. 3169-79. This is ten pages of testimony by Gordon Tongue, Sales Manager of Superior. The facts to which he testified have been summarized in our statement herein. Nothing in his testimony indicates that any "system" was extended to western Washington in 1931. His testimony establishes that Superior in 1929 was forced to destination pricing by a local price war as we have above developed.

R. 3182. Further testimony of Mr. Tongue concerning the area in which Superior can charge its desired mill net plus freight without having to reduce its price to meet competition.

R. 3184. Tongue testifies that from checking back prices he has found that other mills in western Washington have the same maximum mill net as Superior.

R. 3201. Tongue testifies that where Superior's freight rates are lower and consequently its price is lower, other companies, if they wish to sell, drop their prices to meet Superior's and Superior does the same where another company's price is lower.

R. 3204. Tongue testifies that in middle Washington Superior must price to meet the competition of two eastern Washington mills.

R. 3228-30. Wm. P. Cameron, Manager of Olympic Portland Cement Co., testifies to the general market and selling conditions in western Washington, including the fact that the maximum mill nets of the various companies are the same.

R. 3246. C. T. W. Hollister, President of Northwestern Portland Cement Co., testifies that near his mill where he has freight advantage, other mills meet his price and when he goes into territory where other mills have freight advantage, he meets their prices.

Comm. Ex. 111F. Bids opened on February 21, 1935, for Columbia Basin Project. This is one of the three identical bids made by Superior following filed prices under the NRA Code. The bid was well under the mill net of the nearest mill (Spokane Portland Cement Co.), plus rail freight, and therefore did not constitute any use of the so-called "system."

To support its argument against Superior, in addition to citing Finding 7 (n), the Commission

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Comm. Ex. 112D. This is a bid on Grand Coulee Dam in August, 1935, and is another one of the three identical bids made by Superior following filed prices under the NRA Code. The Commission seems to rely heavily on this bid, because not only is it cited in support of Finding 7 (n), but also it is separately referred to in the Commission's brief in support of its case against Superior. (Br. 103). However, this bid does not support any finding that Superior used the alleged "system." True it is that on May 27, 1935, this Court had invalidated the NRA, but high officers of the government had appealed to the patriotism of the country to follow the Codes voluntarily until new legislation was enacted, and Superior felt still morally obligated when this bid was sent in to follow filed prices. (R. 3183, 5406; Resp. Ex. 31A-B). No better proof could be had that this bid was due to the NRA, and not to conspiracy, than the fact established here—that every bid by this company before or since this NRA period has been non-identical. Furthermore, even if the NRA were ignored, this bid is no evidence that Superior used the alleged "system," since the bid was not based thereon. It did not reflect the mill net of any mill plus rail freight. In fact, it was far less than the mill net of any mill. The acting Commissioner of the Bureau of Reclamation, with the approval of the acting Secretary of the Interior, wrote with regard to this bid (Comm. Ex. 112A-D):

> "The prices bid on cement by the Washington companies are regarded by this office as very attractive, particularly in view of a probably rising market, and are appreciably lower than was anticipated."

Comm. Exs. 159-4, -5, -14, -15, -52. Correspondence between the NRA Code Authority, E. P. Lucas as a member of the Code Authority, and various mills bidding on the Bonneville Dam. Superior did not bid on this invitation and is not involved.

Comm. Ex. 159-60. Reply dated April 27, 1934, by the Commissioner of Reclamation to a letter from C. N. Reitze, Vice-President and General Manager of Superior, written to Senator Bone urging that land grant freight rates be announced in connection with the invitation for bids on Grand Coulee. The NRA Code was than in effect requiring filed prices. In the government's call for bids, prices were asked both f.o.b. mill and at destination. (R. 459). Land

states (Br., p. 103) only[6] that E. P. Lucas, President of Superior, was a trustee of the Cement Institute and that there is evidence that the four western Washington mills met for the purpose of promoting the adoption of common rail rates by different railroads, citing R. 3251-3. The conclusion that the purpose of this meeting was to promote

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grant rate information was useful to appraise the actual effect of prices on file. In this connection, it is significant that outside of the three-bids based on filed prices under the NRA Code, Superior has never used control clauses, "derived" f.o.b. mill bids nor in any other way conditioned its bids on land grant freight rates. All bids before and after the NRA have been genuine, non-identical f.o.b. mill bids or unconditional, non-identical destination bids as desired by the government.

Comm. Ex. 593D-E. Lists of the officiary of the Cement Institute.

Comm. Ex. 608-628. Minutes of meetings of the trustees of the Cement Institute. Superior is not once mentioned herein.

Comm. Ex. 123A-B. Statement of the price bases of the various cement mills in the country including Superior.

Comm. Ex. 2366A-B. List of price bases used by Louisville Cement Co. It does not cover Superior's territory and must have been included because of confusion between Superior Portland Cement, Inc., of Seattle, and the Superior Cement Corporation of Superior, Ohio. There is no connection between the two companies.

Comm. Ex. 2777A-C. List of price bases including Superior's.

[6]On p. 100 of its brief, the Commission accuses "respondent producers on the West Coast" of clearing rates through the Pacific Coast Cement Institute thus enabling them to use common freight rate factors. The evidence cited, however, concerns only southern California companies. Also on this same page the Commission's brief states that one of the principal activities of the Pacific Coast Cement Institute was the collection and dissemination of land

common rail rates is not justified by the record. On the contrary, it is clear that each company was struggling for every competitive advantage possible.[7] Moreover, it should be pointed out that this meeting involved only local western Washington companies and rates to local western Washington points and did not involve rates on any shipments of cement between states. Neither this meeting nor Mr. Lucas' position as trustee of the Institute indicate in any way that Superior, in its actual pricing practices, employed the alleged "system."

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grant rate information. In support of this statement, the Commission cites Finding 8 (o), R. 16022, but cites no evidence in support of the Finding. The Finding deals in generalities, mentioning no company by name. The fact is that there is no evidence in the record that Superior ever gave to, received from or cleared any rates through the Pacific Coast Cement Institute. Counsel for the Commission have fallen into the same false use of the general term "respondents" that makes the Commission's Findings so ambiguous and misleading.

On p. 103 of its brief, the Commission refers to the August, 1935, bid on Grand Coulee Dam. This is the same bid cited in support of Finding 7 (n) and is discussed in footnote 5 above.

[7]This was a meeting called to consider new applications for rail rates that had been filed with the carriers. The Commission neglects to cite the minutes of this meeting (Comm. Ex. 1199A-D) which are quite complete and which indicate that the cement companies were far from being in agreement as to what the rates should be and the meeting broke up with each company intending to make separate, contrary recommendations to the railroads. The meeting was held on November 28, 1929, in the early stages of a very bitter price war. Each company was fighting for its own survival.

We submit that there is no evidence in this record to the effect that Superior uses the "system" in connection with sales of cement between states, as alleged in the complaint, and that the uncontradicted evidence affirmatively establishes that it does not. Absent, then, is the first of the Commission's two "general principles." Remaining is only membership in the Cement Institute and activity of Mr. Lucas as a trustee thereof. But the conspiracy charged in the complaint is agreement to employ and actual employment of a certain alleged system of pricing in connection with sales between states. (R. 29, 48, 54). One cannot infer from membership in the Institute that Superior agreed to employ, and actually employed, this "system," when the facts establish that it did not employ the "system," but, rather, adopted pricing methods in competing with sales between states inconsistent with the "system." For example, suppose the Bar Association were charged with a conspiracy whereunder they fixed the fee for divorces at $500.00. Lawyer X was a member of the Bar Association, but consistently charged only $200.00 for divorces. Obviously, his membership in the Bar Association would not be sufficient to charge him with the conspiracy. As this Court held in *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 340-41, a fact cannot be established by

inference where there is uncontradicted direct evidence that the fact does not exist.

No different result is suggested in the cases cited by the Commission.[8] In all of them, the party charged not only was a member of the Association, but also actually participated in the acts which were contrary to law.

Furthermore, we wish to point out that Superior did not become a member of the Institute until 1933 when it received a patriotic appeal to join so as to participate in the N.I.R.A. Its use of the Institute after that time did not include the various services which the Commission argues implemented the alleged "system." These facts make even more inadmissible any argument that from membership in the Cement Institute one may infer that Superior agreed to employ and actually employed the alleged pricing "system."

We submit, therefore, that there are no findings and no evidence to support an order in this case against Superior under Count I of the complaint.

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[8] *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 139 F. (2d) 393 (C.C.A. 2); *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. (2d) 321, 331 (C.C.A. 7); *Interstate Circuit v. United States*, 306 U. S. 208, 227; *United States v. Bausch & Lomb*, 321 U. S. 707, 723; *Direct Sales Co. v. United States*, 319 U. S. 703, 713.

II.

No Violation of Clayton Act by Superior

Under Count II of the complaint, the charge is discrimination in price in interstate commerce in violation of the Clayton Act. This Count adopts the definition of Count I limiting interstate commerce to commerce between states. (Comp. Count I, Par. II, R. 29; Count II, Par. II, R. 218).

Superior does not sell cement between states. Consequently, it could not be guilty of price discrimination on its sales under the Clayton Act, which provides that "either or any" of the purchases involved must be in commerce.[9]

In view of the fact that Superior's pricing practices where competing with out-of-state cement do not involve the "discrimination" asserted here, it cannot be said that Superior has assisted such interstate discriminations by other companies, even if assistance of discriminations by others were an offense chargeable under the Clayton Act, which we deny.

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[9]Act of June 19, 1936, Sec. 2A, Ch. 592, 49 Stat. 1526. See also Statement of Managers on part of House, Report No. 2951 on H. R. 8442, 74th Cong., June 8, 1936; Statement of Mr. Utterbach in the House after submission of conference report, 80 Cong. Record, P. 9559, June 15, 1936.

CONCLUSION

The facts concerning Superior do more than demonstrate that it is not a party to any conspiracy as charged. They have significance to the case as a whole. The argument of the Commission against the industry really comes down to identity in price. Yet it is obvious that under any pricing system the price of cement at any one time and place must be identical between all companies desiring to compete for the business. During the twenty years in which Superior and its competitors sold f.o.b. mill, at all points where more than one mill sold cement there was identity in cost to the customer for cement from any of the competing mills. During the price war from 1929 to 1931, in which competition was so fierce that it almost bankrupt every mill in the area, the cost of cement to a customer at any one time and place was still identical except for the momentary periods during which competitors had not learned of secret price cuts. As soon as they learned of them, which was usually immediately, the competitors necessarily lowered their prices to meet the cuts.

In the process of price competition involving price cutting, there must come a point below which no competitor dare cut the price without risking insolvency. Unless cutthroat and reckless strife

exists, the price will necessarily stabilize there and will be identical between all competitors selling at that point, no matter what the pricing system. We would think a great deal more of the Commission's case here, if it had proved that the price of cement had not dropped to this irreducible minimum. The Commission offered no evidence as to this, and when respondents offered to prove that it had dropped to that point, the Commission excluded the evidence. Under these circumstances, price identity is no indication of restraint of trade.

Irrespective of the general case, however, the Commission erred in failing to dismiss Superior. Even the dissenting Judge in the Circuit Court of Appeals indicated that some of the respondents were improperly charged. Superior certainly is one.

Respectfully submitted,

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